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Constitutional Law—Anti-Bias Crime Legislation and the First Amendment—Supreme Court Upholds Wisconsin's Penalty Enhancement Law. Wisconsin v. Mitchell, 133 S. Ct. 2194 (1993).

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CONSTITUTIONAL LAW—ANTI-BIAS CRIME LEGISLATION AND THE FIRST AMENDMENT—SUPREME COURT UPHOLDS WISCONSIN'S PENALTY ENHANCEMENT LAW, *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

I. INTRODUCTION

In Tampa, Florida, two white men poured gasoline over a black tourist, stated "you're a nigger and you're going to die," and then set him afire.[1] In Wilmington, North Carolina, three Marines dragged a homosexual out of a bar and beat him while yelling "Clinton must pay" and "[a]ll you faggots will die."[2] In La Habra, California, attackers yelled racial slurs at a black woman as they pounded her head into the pavement of a mall parking lot while one of her children and several shoppers looked on.[3] These types of crimes, known as hate or bias crimes,[4] are not uncommon in the United States.[5]

A bias crime has been defined as one in which a perpetrator intentionally acts against a person or property on the basis of the victim's actual or perceived race, color, religion, national origin, ethnicity, sex, sexual origin, or disability.[6] In response to the

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1. Frank Bruni & Constance C. Prater, *Racist Torching Haunts the Nation: Black Victim Faced Angry Young Whites*, DETROIT FREE PRESS, Jan. 18, 1993, at 9A. Fortunately, the victim survived the attack. *Id.*

2. *3 Marines Arrested for Beating Gay at Bar*, CHI. TRIB., Feb. 2, 1993, at 3. After the attack the Marines reportedly said that they hated all "faggots," wished that all homosexuals were dead, and that they were not ashamed of what they did. *Id.*

3. Jodi Wilgoren, *Senseless Violence Leaves Its Deadly Mark on O.C.*, Los ANGELES TIMES, O.C. EDITION, Dec. 28, 1993, at 10A. The victim subsequently died of a heart attack. *Id.*

4. The term bias is used throughout this note, but bias and hate are interchangeable for the purposes of this piece.

5. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, REPORT ON HATE CRIMES (1993). This report compiled data provided by 2,771 law enforcement agencies on incidents of crimes motivated by bias in 1991. Of those reported, 62.3% of the crimes were motivated by race, 19.3% were motivated by religion, 9.5% were motivated by ethnicity, and 8.9% were motivated by sexual orientation. *Id.* at 4. The Klanwatch Project of Alabama issued a report on bias motivated crimes for 1992 noting that these crimes are not restricted to one particular group or region, rather they occur throughout the United States and affect all racial groups. Terry Box, *Increasingly, Whites Targeted by Blacks: Group Finds New Type of Hate Crime*, DALLAS MORNING NEWS, May 4, 1993, at 5A.

6. H.R. 3355, 103d Cong., 1st Sess. § 2409(a) (1993). This proposal would direct the U.S. Sentencing Commission to increase sentences by approximately one-third for crimes motivated by hate or prejudice. *Id.*

perceived harms caused by bias crimes,[7] the federal government[8] and most states[9] have enacted some form of anti-bias crime legislation. Generally, there are four types of anti-bias crime laws: penalty enhancement laws,[10] pure bias crime laws,[11] ethnic intimidation or malicious harassment laws,[12] and laws that prohibit the placement or desecration of religious objects and other various emblems.[13]

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7. Amicus Curiae Brief of the Jewish Advocacy Center in Support of Petitioner, LEXIS, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515). Bias crimes are believed to create specific harms to society. First, they cause harm not just to the individual victim, but to the group that the individual represents as a whole. As a result, the entire group feels intimidated, threatened, and vulnerable to random acts of violence. This, in turn, often creates retaliatory crimes by the "victimized" group. *Id.* Second, there is evidence that bias crimes involve excessive violence compared to nonbias crimes. Amicus Curiae Brief of the California Association of Human Rights Organizations et al. in Support of Petitioner, LEXIS, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515).

8. *See, e.g.*, Federal Sentencing Guidelines § 2H1.1. The background comment states that this section applies to intimidating activity by hate groups and authorizes increased maximum terms of imprisonment.

9. For an excellent examination of the various types of bias crime laws enacted in each state, see ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS: A COMPREHENSIVE GUIDE (1994).

10. Penalty enhancement laws provide enhanced sentences for criminal acts motivated by bias. *See, e.g.*, FLA. STAT. ANN. § 775.085 (West 1992); ILL. ANN. STAT. ch. 730, para. 5-5-3.2(a)(10) (Smith-Hurd 1992); MONT. CODE ANN. § 45-5-222 (1993); N.H. REV. STAT. ANN. § 651:6(I)(g) (Supp. 1993); N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1994); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1993); WIS. STAT. ANN. § 939.645 (West Supp. 1993).

11. Pure bias crime laws provide for punishment of bias motivated acts that interfere with a person's civil rights. *See, e.g.*, CAL. PENAL CODE § 422.6 (West Supp. 1994); CONN. GEN. STAT. ANN. § 53-37a (West 1985); IOWA CODE ANN. § 729A.2 (West 1993); MD. ANN. CODE art. 27, § 470A (Supp. 1993); MINN. STAT. ANN. § 609.2231 subd. 4 (West Supp. 1994); NEV. REV. STAT. ANN. § 207.185 (Michie Supp. 1993); N.D. CENT. CODE § 12.1-14-04 (1985); TENN. CODE ANN. § 39-17-309 (1991); UTAH CODE ANN. § 76-3-203.3 (Supp. 1994); VA. CODE ANN. § 8.01-42.1 (Michie 1992); W. VA. CODE § 61-6-21 (1992).

12. Ethnic intimidation laws punish acts of bias motivated intimidation. *See, e.g.*, COLO. REV. STAT. ANN. § 18-9-121 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 1990); MICH. COMP. LAWS ANN. § 750.147b (West 1991); MO. ANN. STAT. § 574.090 (Vernon Supp. 1993); OHIO REV. CODE ANN. § 2927.12 (Anderson 1993); OR. REV. STAT. § 166.165 (1985); 18 PA. CONS. STAT. ANN. § 2710 (1983); R.I. GEN. LAWS § 11-42-3 (1993).

Malicious harassment laws punish acts of bias motivated harassment. *See, e.g.*, IDAHO CODE § 18-7902 (1987); N.Y. PENAL LAW § 240.31 (McKinney 1989); WASH. REV. CODE ANN. § 9A.36.080 (West Supp. 1994). For laws that prohibit both ethnic intimidation and malicious harassment, see MONT. CODE ANN. § 45-5-221 (1993); OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1994).

13. *See, e.g.*, D.C. CODE ANN. § 22-3112.2 (1989) (prohibiting the placement or display of any "sign, mark, symbol, emblem, or other physical impression, including but not limited to a Nazi swastika or . . . a burning cross" with the

In 1992 the validity of state anti-bias crime legislation became uncertain when the Supreme Court decided *R.A.V. v. City of St. Paul, Minn.*[14] In 1990, Robert A. Viktora and accomplices constructed and burned a cross inside the fenced yard of a black family.[15] Viktora was charged with violating the St. Paul ordinance which prohibited the placement, on public or private property, of any symbol or object that would arouse anger, alarm, or cause resentment in another on the basis of certain characteristics, such as race.[16]

In invalidating the ordinance as unconstitutional,[17] the Court accepted the Minnesota Supreme Court's construction of the statute as applying only to "fighting words"[18] and held that such a regulation may not be selectively imposed based on the message sought to be conveyed.[19] The Court stated that a prohibition on fighting words

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intent to deprive any person of her civil rights or with the intent to "intimidate, threaten, abuse or harass" any person); GA. CODE ANN. § 16-11-37 (Harrison 1992) (prohibiting the burning of a cross or other symbol); N.J. STAT. ANN. § 2C:33-11 (West 1982) (prohibiting the placement of a symbol, object, characterization, appellation or graffiti "including, but not limited to, a burning cross or Nazi swastika" that would expose another to violence or hatred "on the basis of race, color, creed or religion"); N.C. GEN. STAT. § 14-12.12 (1993) (prohibiting the placement of a burning or flaming cross with the intent to intimidate); R.I. GEN. LAWS § 11-53-2 (1993); S.C. CODE ANN. § 16-7-120 (Law. Co-op. 1985) (prohibiting the burning or desecration of "a cross or other religious symbol" or placement or display of "a sign, mark, symbol, emblem, or other physical impression, including but not limited to a Nazi swastika").

14. 112 S. Ct. 2538 (1992). There has been much scholarly work on *R.A.V.* and the issue of the constitutionality of prohibitions on bias crimes. In support of bias crime laws, see David Chang, *Lynching and Terrorism, Speech, and R.A.V.: The Constitutionality of Wisconsin's Hate Crimes Statute*, 10 N.Y.L. SCH. J. HUM. RTS. 455 (1993); Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement For Bias Crimes*, 93 COLUM. L. REV. 178 (1993). *But see* Susan Gellman, *Sticks and Stones Can Put you in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991).

15. *R.A.V.*, 112 S. Ct. at 2541.

16. *Id.* The St. Paul Bias-Motivated Crime Ordinance provided:

> Whoever places on public property a symbol, object, appellation, characterization or graffiti, included but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

17. *Id.* at 2542.

18. *Id.* Fighting words are "those which by their very utterance" injure or incite immediate breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see infra* notes 65-67 and accompanying text.

19. *R.A.V.*, 112 S. Ct. at 2542 (stating that the ordinance attempted to prohibit "otherwise permitted speech solely on the basis of the subjects the speech addresses").

must proscribe the manner of expression, not the expressed thought itself, in order to withstand constitutional challenge.[20]

After this ruling, states were faced with the question of whether they could constitutionally punish bias crimes without violating the First Amendment.[21] In 1993, the Supreme Court resolved much of the concern relating to the constitutionality of penalty enhancement laws for bias crimes in *Wisconsin v. Mitchell*.[22] When analyzing the defendant's First Amendment rights, the Court upheld the Wisconsin penalty enhancement provision[23] as constitutional[24] and found that *R.A.V.* was not controlling.[25]

To facilitate understanding of why the *Mitchell* Court reached its holding, development of First Amendment theories and case law is discussed first in the historical section of this note. Then, the evidentiary use of speech to prove motive and the corresponding

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20. *Id.* at 2548-49. The St. Paul ordinance prohibited any manner used to express a message of hatred concerning race, gender, or religion as opposed to prohibiting those fighting words which are expressed in a particular manner (i.e., an offensive or threatening manner). *Id.* at 2549.

21. *See, e.g.*, State v. Wyant, 597 N.E.2d 450 (Ohio 1992), *vacated and remanded*, 113 S. Ct. 2954 (1993) (invalidating Ohio ethnic intimidation law); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), *rev'd sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). *But see, e.g., In re* Joshua H., 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993) (upholding California penalty enhancement law); People v. Miccio, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992) (upholding New York bias crime law); Dobbins v. State, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992), *aff'd* 631 So. 2d 303 (Fla. 1994) (upholding Florida penalty enhancement law); People v. Mulqueen, 589 N.Y.S.2d 246 (Nassau County 1st Dist. Crim. Ct. 1992) (upholding New York bias crime law); State v. Plowman, 838 P.2d 558 (Or. 1992), *cert. denied sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 2967 (1993) (upholding Oregon ethnic intimidation law); State v. Hendrix, 813 P.2d 1115 (Or. Ct. App. 1991), *cert. denied sub nom.* Hendrix v. Oregon, 113 S. Ct. 2966 (1993) (upholding Oregon ethnic intimidation law); People v. Grupe, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988) (upholding New York bias crime law).

22. 113 S. Ct. 2194 (1993).

23. *Id.* at 2197 n.1. The pertinent part of the Wisconsin statute at the time of Mitchell's conviction provided that the penalties for an underlying crime are increased if a person:

> Intentionally selects the person against whom the crime is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

Id. (quoting WIS. STAT. § 939.645 (1989-1990)). This statute was amended in 1993 but the amendments were not at issue.

24. *Id.* at 2202 (holding that the defendant's First Amendment rights were not violated).

25. *Id.* at 2200-01 (stating that *R.A.V.* only applies to laws that discriminate between acts on the basis of their expressive content).

punishment of acts motivated by bias in both criminal law and civil anti-discrimination laws are examined.

II. FACTS

On October 7, 1989, 19 year old Todd Mitchell incited a group of young black men to severely beat a 14 year old white male.[26] Mitchell and the group were at an apartment complex in Kenosha, Wisconsin, when the topic of conversation turned to a scene from the movie "Mississippi Burning" in which a young black boy was beaten by a white man.[27] The group moved outside the apartment complex and Mitchell asked: " '[Y]ou all feel hyped up to move on some white people?' "[28] At Mitchell's direction the group attacked Gregory Reddick, a young white male, who was walking on the opposite side of the street from Mitchell and the group.[29] In the course of the assault, Reddick was knocked to the ground, severely beaten, and robbed.[30]

Mitchell was convicted of aggravated battery and theft and sentenced to four years imprisonment.[31] Although conviction of this offense normally carries a sentence of two years imprisonment,[32] because the jury found that Mitchell chose his victim because of his victim's race, Mitchell was sentenced to an additional two years under the Wisconsin penalty enhancement statute.[33]

On appeal, Mitchell argued that the penalty enhancement provision violated his First Amendment rights because it punished his protected thoughts.[34] The Wisconsin Court of Appeals rejected Mitchell's First Amendment challenge and upheld the penalty enhancement provision.[35] On further appeal, the Wisconsin Supreme Court reversed

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26. *Id.* at 2196-97.

27. *Id.* at 2196.

28. *Id.*

29. State v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992), *rev'd sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). Mitchell said, "You all want to . . . [expletive] somebody up? There goes a white boy; go get him." *Id.* Mitchell then counted to three and pointed at Reddick. *Id.*

30. *Id.* Reddick remained in a coma for four days. The record indicates that his injuries may have resulted in permanent brain damage. *Id.*

31. *Id.* Mitchell was charged and convicted under WIS. STAT. §§ 939.05 and 940.19(1m) (1989-1990). *Id.*

32. State v. Mitchell, 485 N.W.2d at 809; *see* WIS. STAT. §§ 940.19(1m) and 939.50(3)(e) (1989-1990).

33. Wisconsin v. Mitchell, 113 S. Ct. at 2197; see *supra* note 23 for the text of the statute.

34. State v. Mitchell, 485 N.W.2d at 811.

35. State v. Mitchell, 473 N.W.2d 1 (Wis. Ct. App. 1991).

the Court of Appeals in a five to two decision[36] and struck down the statute on the grounds that it violated the First Amendment.[37]

The Wisconsin Supreme Court cited *R.A.V.* in support of its holding invalidating the Wisconsin statute on First Amendment grounds[38] and stated that the penalty enhancement provision was invalid because it directly punished the defendant's constitutionally protected thoughts.[39] The court also found that punishment of Mitchell's biased motive for selecting his victim was an unconstitutional violation of Mitchell's First Amendment freedoms.[40] In addition, the court distinguished permissible anti-discrimination laws from the Wisconsin penalty enhancement provision[41] and held that the provision was overbroad[42] because it would impermissibly chill free speech.[43]

The two dissenting justices concluded that the statute punished conduct, namely discriminatory selection, not protected expression, and, therefore, *R.A.V.* did not control.[44] The dissenters also stated that the statute was not overbroad[45] and that use of the defendant's speech to circumstantially prove intentional discriminatory selection

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36. State v. Mitchell, 485 N.W.2d at 807 (Abrahamson, J., dissenting).

37. State v. Mitchell, 485 N.W. at 811 (stating that the statute violated the First Amendment directly by punishing "offensive" thought and indirectly by chilling free speech).

38. *Id.* at 814-15 (stating that the Wisconsin statute and the St. Paul ordinance both targeted the biased message conveyed).

39. *Id.* at 815. The court rejected the state's position that the statute only punished conduct, the intentional selection of a victim, and stated that this literal reading of the statute did not preclude the court from analyzing its practical effect. *Id.*

40. *Id.* at 812 (relying on Gellman's theory, *see supra* note 14, at 363-68, that motive is not constitutionally punishable, the court stated that "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection").

41. *Id.* at 816-17. The court reasoned that anti-discrimination laws punish objective acts while a penalty enhancement provision penalizes the subjective mental process of selecting a victim because of his protected status. *Id.*

42. *Id.* at 815 (quoting Bachowski v. Salamone, 407 N.W.2d 533, 539 (Wis. 1987)) (stating that overbroad laws tend to deter people from exercising their constitutionally protected rights because they include permissible activity within their scope).

43. *Id.* at 815-16. The court, again relying on Gellman, *supra* note 14, at 360-61, stated that because the penalty enhancement provision allowed the use of speech to prove that the defendant was motivated by bias when he intentionally selected his victim, use of the defendant's words in this way would punish protected speech and result in a chilling effect that would prevent people from expressing themselves for fear of future prosecution under the statute. *Id.*

44. *Id.* at 819 (Abrahamson, J., dissenting); *id.* at 821 (Bablitch, J., dissenting).

45. *Id.* at 821 (Bablitch, J., dissenting).

of the victim would not produce a chilling effect.[46] The United States Supreme Court granted certiorari[47] and unanimously held that the Wisconsin penalty enhancement provision was constitutional.[48]

III. Historical Development

A. Government Regulation and Constitutional Protection of Speech

In 1789, the importance of free speech was recognized when the First Amendment was added to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech."[49] Various theories have been offered to explain the significance of the First Amendment guarantee of the freedom of speech.[50] Originally, support for this freedom was closely linked to the search for political truth. For example, in 1927, Justice Brandeis asserted that the freedom to form one's opinion and to speak one's mind about that opinion was a "means indispensable to the discovery and spread of political truth."[51] Another early proponent of free speech, Justice Holmes, advanced the "market place of ideas" theory for protection of speech in *Abrams v. United States*.[52] Justice Holmes based his theory on the premise that the truth of any idea, not necessarily a political one, is determined by the power of that idea to get itself accepted in the marketplace of competing ideas.[53] A more modern

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46. *Id.* at 819 (Abrahamson, J., dissenting) (stating that the provision chilled lawless conduct and that only the beliefs or speech of the defendant that directly related to the offense charged were relevant); *id.* at 822 (Bablitch, J., dissenting) (stating that "[i]t is no more chilling of free speech to allow words to prove the act of intentional selection . . . than it is to allow a defendant's words that he 'hated John Smith and wished he were dead' to prove a defendant intentionally murdered John Smith").

47. Wisconsin v. Mitchell, 113 S. Ct. 810 (1992). The Court cited the existing conflict among state courts on the constitutionality of similar penalty enhancement statutes among its reasons for granting certiorari. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2198 (1993).

48. Wisconsin v. Mitchell, 113 S. Ct. at 2202.

49. U.S. Const. amend. 1. Constitutional protection of First Amendment freedoms also extends to state laws and regulations. Gitlow v. New York, 628 U.S. 652, 666 (1925) (holding that the Due Process Clause of the Fourteenth Amendment protects First Amendment freedoms against state infringement).

50. For a more thorough analysis of the philosophies underlying the First Amendment, see generally Congressional Research Service, The Constitution of the United States: Analysis and Interpretation, S. Doc. No. 16, 99th Cong., 1st Sess. 1004-06 (1987).

51. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

52. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

53. *Id.* "[T]hat the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.*

theory offered in support of the First Amendment considers free speech to be vital to individual self-fulfillment and growth.[54]

Regardless of which theory one subscribes to, the First Amendment right of free speech has been recognized as the foundation for all other constitutionally guaranteed freedoms.[55] Thus, while the First Amendment guarantee initially pertained to political speech, constitutional protection has also been extended to areas of speech outside the political realm.[56] In recognition of the importance of free speech to society, the Supreme Court has stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[57]

1. *Content-Based Regulation of Speech*

Legislation aimed at censoring, punishing or discriminating against communication because of its content[58] is subject to strict scrutiny[59] and will most likely be struck down as violating the First Amendment.[60]

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54. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1971).

55. Palko v. Connecticut, 302 U.S. 319 (1937). Justice Cardozo identified free speech as "the indispensable condition of nearly every other form of freedom." *Id.* at 327.

56. *See, e.g.*, Schad v. Borough of Mount Ephriam, 452 U.S. 61, 65-66 (1981) (recognizing that movies, radio and television programs, and live entertainment are protected by the First Amendment); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (stating that movies are protected by the First Amendment).

57. Police Dept. of Chicago v. Mosley, 408 U.S 92, 95 (1972) (citations omitted).

58. The following example illustrates the difference between content-based and content-neutral regulation of speech. A law prohibiting marches for the purpose of celebrating gay pride is content-based because it proscribes the content of the communication; its purpose is to prevent the communication of the message of gay pride. Conversely, a law regulating the hours of the day in which any march may be conducted is content-neutral because its purpose is to regulate the time not the content; the content of the march here is irrelevant. For further examples of permissible and impermissible regulation of speech, see LAURENCE H. TRIBE & RALPH S. TYLER, JR., AMERICAN CONSTITUTIONAL LAW § 12-3, at 797-804 (2d ed. 1988).

59. Simon & Schuster, Inc. v. New York Crime Victims Bd., 112 S. Ct. 501 (1991). The government must show that the content-based regulation of speech serves a compelling interest and that it is narrowly tailored to meet that end. *Id.* at 509 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

60. *Id.* at 508 (quoting Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984)). " 'Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.' " *Id.; see also* R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538, 2542 (1992) (stating that content-based regulations of speech are presumptively invalid); Cohen v. California, 403 U.S. 15, 23 (1971) (holding that speech cannot be prohibited simply because the ideas expressed offend or insult).

Thus, while reasonable time, place and manner regulations of speech are permitted,[61] regulations which discriminate based on the message to be conveyed are content-based and generally prohibited.[62]

Nevertheless, the First Amendment guarantee does not protect every conceivable statement or action.[63] The Court has held that some kinds of speech may be constitutionally prohibited while others are entitled to less than full protection.[64] As the Court stated in *Chaplinsky v. New Hampshire*,[65] "[t]here are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise constitutional problems."[66] For example, "fighting words,"[67] fraud,[68] and obscenity[69] are classes of speech which receive virtually no First Amendment protection,[70]

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61. United States v. Grace, 461 U.S. 171, 177 (1983) (explaining that reasonable time, place and manner restrictions on speech are permitted so long as the restrictions are content-neutral, narrowly tailored to serve an important governmental interest, and provide for alternative means of communication).

62. *See, e.g., R.A.V.*, 112 S. Ct. at 2542; *Simon & Schuster, Inc.*, 112 S. Ct. at 508; *Cohen*, 403 U.S. at 23. The following regulations have been held to be impermissibly content-discriminatory: prohibiting desecration of the American flag, Texas v. Johnson, 491 U.S. 397, 410-20 (1989); prohibiting the wearing of armbands to protest the Vietnam War, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 510-11 (1969); prohibiting labor picketing, Police Dept. v. Mosley, 408 U.S. 92, 101-02 (1972).

63. As Justice Holmes stated in Schenck v. United States, 249 U.S. 47, 52 (1919), "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

64. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that expression, through speech or conduct, may be subject to reasonable time, place, and manner regulations); United States v. O'Brien, 391 U.S. 367, 376 (1968) (holding that an important governmental interest may justify regulation of expressive conduct).

65. 315 U.S. 568 (1942).

66. *Id.* at 571-72.

67. *Id.* at 572 (holding that fighting words, those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not protected by the First Amendment because such words are of little social value in the search for truth and constitute "no *essential* part of any exposition of ideas") (emphasis added); *see also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545 (1992).

68. *Cf.* Schneider v. State, 308 U.S. 147, 164 (1939) (stating that frauds are punishable by law); *In re* American Continental Corp., 794 F. Supp. 1424, 1448 (D. Ariz. 1992) (stating that the First Amendment does not protect fraud or misrepresentation); Nichols v. G.D. Searle & Co., 783 F. Supp. 233, 243 (D. Md. 1992) (stating that fraud is not protected under First Amendment), *aff'd*, 991 F.2d 1195 (4th Cir. 1993).

69. *See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

70. However, regulation of these categories of speech must be content-neutral unless it falls into one of the three exceptions to the rule against content-based regulation. *See R.A.V.*, 112 S. Ct. at 2545-49.

while other classes of speech, such as defamation[71] and commercial speech,[72] receive minimal constitutional protection.

2. *The Difference Between Unprotected Conduct and Protected Speech*

In addition to extending little or no protection for certain types of speech, the Court also has distinguished between "pure speech" and "speech plus conduct."[73] According to the Court, speech plus conduct is entitled to less constitutional protection than pure speech under the First Amendment.[74] The Supreme Court's development of this issue is most clearly illustrated in the context of picketing cases.

In 1940, the Court held that peaceful picketing involving a labor dispute was constitutionally protected free speech.[75] But in 1957, the Court determined that picketing was more than speech because it involved the physical presence of a picketing line.[76] The Court held that the existence of this non-speech element, the physical presence of the picketers, constituted speech plus conduct and, therefore, subjected picketing to regulation.[77] The Court supported this reasoning in a subsequent non-picketing case which held that the First

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71. *See, e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (holding that a private figure plaintiff must prove falsity of statement to recover damages for defamation); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (holding that a private figure plaintiff may recover presumed and punitive damages if speech is a matter of private concern); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that states cannot impose strict liability for defamation of private individual); New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that a public figure plaintiff must show actual malice in order to recover for defamation).

72. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-63 (1980) (holding that commercial speech receives less constitutional protection than other classes of protected speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (holding that commercial speech is not without some First Amendment protection).

73. Cox v. Louisiana, 379 U.S. 536, 555 (1965). The term speech plus conduct refers to the combination of speech and nonspeech elements in the same course of action.

74. *Id.*

75. Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (invalidating a state law prohibiting all union picketing).

76. International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957) (quoting Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 776 (1949) (Douglas, J., concurring)) (upholding a state law prohibiting peaceful labor picketing for illegal purposes).

77. *Id.* at 289 (stating that even peaceful picketing involves more than mere communication of ideas and, thus, is not immune from state regulation).

Amendment affords pure speech more protection than speech plus conduct.[78]

Consequently, the Court has stated that the First Amendment does not provide the same level of protection to ideas expressed by conduct as it does to ideas expressed by words.[79] Moreover, the Court has recognized that it has never been a violation of the freedom of speech to make an act illegal merely because the act was initiated, evidenced, or carried out through speech.[80] One type of potentially expressive conduct, of particular relevance to the *Mitchell* holding, that has received no First Amendment protection is violence.[81] Other forms of expression that have been held to be unprotected conduct include a demonstration on the premises of a county jail[82] and the burning of a draft card.[83] Conversely, the Court has held that holding a silent demonstration in a public library[84] and attaching a peace symbol to an American flag[85] constitute protected speech. As a result of this persistent yet problematic distinction between conduct and speech,[86] courts are faced with the issue of determining at what

78. *Cox*, 379 U.S. at 555. On the steps of a courthouse, 2000 students participated in a demonstration protesting segregation. *Id.*

79. *Id.* (rejecting the argument that the First Amendment affords the same kind of protection to those who communicate ideas by conduct as to those who communicate ideas by "pure speech").

80. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (upholding a state prohibition on picketing).

81. *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (explaining that violence produces unique harms apart from any communicative effect and therefore receives no constitutional protection); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (stating that violence is not protected by the First Amendment).

82. Adderley v. Florida, 385 U.S. 39, 42 (1966) (upholding a Florida trespass statute).

83. United States v. O'Brien, 391 U.S. 367, 367-77 (1968) (upholding federal law prohibiting desecration of draft cards).

84. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (reversing a Louisiana breach of the peace conviction).

85. Spence v. Washington, 418 U.S. 405, 415 (1974) (invalidating flag misuse statute).

86. There has been much scholarly material written on the speech/conduct dichotomy which mainly contends that there is no meaningful distinction between speech and conduct. *See, e.g.*, TRIBE & TYLER, *supra* note 58, § 12.2. Tribe states that "expressive behavior is '100% action and 100% expression,' " therefore, almost all communication involves conduct, hence, much conduct is expressive. Tribe also notes that the Court has never articulated a basis for its distinction between conduct and speech, it simply reaches a conclusion; thus, there is no analytical process used to reach the conclusion that the communication is either conduct or speech. TRIBE & TYLER, *supra* note 58, § 12-7; *see also* Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 691 (1993). Lawrence also suggests that

point conduct becomes expression protected under the First Amendment.

The threshold question involved when a court is faced with this issue is whether the conduct may be classified as expressive communication.[87] In *Spence v. Washington*,[88] the Court held that conduct amounts to expressive communication when (1) there is an intent to convey a particular message, and (2) there is a likelihood that the message will be understood by those who view it.[89] However, satisfaction of the *Spence* requirements does not automatically extend First Amendment protection to the expressive communication at issue.[90] In fact, the Court has absolutely rejected the view that conduct can be labeled speech whenever the person intends to thereby express an idea.[91]

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there is no meaningful distinction between conduct and speech because they are inextricably bound together. Lawrence, *supra*, at 692. Lawrence states that the speech/conduct dichotomy is weak because most conduct involves expression while most expression involves conduct. For example, cross burning is 100% action directed at a victim and 100% expression of "deeply felt racism." Lawrence, *supra*, at 694 (referring to *R.A.V.*). Lawrence also agrees that application of the distinction between speech and conduct "requires a process that assumes its own conclusions." Lawrence, *supra*, at 694.

87. Without some communicative element there is no First Amendment analysis involved. *See* Spence v. Washington, 418 U.S. 405, 409 (1974) (stating that in order for an activity to be considered expressive conduct within the scope of the First Amendment, it must be "sufficiently imbued with elements of communication").

88. 418 U.S. 405 (1974) (striking down a flag misuse statute invoked against a protester who affixed a peace symbol on the American flag and flew it from a window).

89. *Id.* at 410-11. One problem that results from *Spence* is determining whether or not a particular message is intended by the conduct at issue. Often the Court simply announces its conclusion without any satisfactory explanation. *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991) (holding as expressive conduct nude dancing and stating that it was "within the outer perimeters" of First Amendment protection); Texas v. Johnson, 491 U.S. 397, 406 (1989) (quoting *Spence*, 418 U.S. at 409) (holding as expressive conduct burning an American flag and stating that it was conduct " 'sufficiently imbued with elements of communication' "); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969) (holding as expressive conduct wearing a black arm band to protest the Vietnam War and merely stating that it was "closely akin to 'pure speech' "); Stromberg v. California, 283 U.S. 359, 370-71 (1931) (holding as expressive conduct the displaying of a red flag).

However, it is important to remember that when violent conduct is involved the expression loses any First Amendment protection it may have had. *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); NAACP v. Clairborne Hardware Co., 458 U.S. 886, 916 (1982).

90. United States v. O'Brien, 391 U.S. 367, 376 (1968) (stating that when the conduct involves both speech and nonspeech elements, a "sufficiently important governmental interest" in the regulation of the nonspeech element may justify incidental limitation of free speech).

91. *Id.*

Once it is determined that the conduct at issue is expressive speech, courts must analyze the challenged regulation in light of the First Amendment guarantee. If the regulation is aimed at the content of the communication, it will likely be struck down as unconstitutional.[92] For content-neutral regulation of expressive conduct, the judicial standards for review are clearly set out in *United States v. O'Brien*.[93] According to *O'Brien*, a government regulation aimed at conduct may place "incidental limitations" on speech if (1) the conduct itself can be properly regulated, (2) the regulation serves a substantial governmental interest, (3) the government's interest is unrelated to the suppression of free speech, and (4) the limitations on free speech are no greater than necessary to serve governmental interests.[94] It is important to remember that *O'Brien* only provides for constitutional scrutiny of laws which regulate acts that fall within the scope of expressive conduct.

3. *Overbreadth Application to Regulations of Speech*

In addition to the invalidation of regulations of speech which violate the content-neutrality rule, laws which regulate speech may also be struck down on grounds of overbreadth. Those laws which sweep so broadly in scope that they would prohibit both protected and unprotected speech are void for being unconstitutionally overbroad.[95] Therefore, to survive First Amendment scrutiny, laws regulating speech must be carefully drafted so as not to infringe upon protected freedoms.[96] It is important to note, however, that

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92. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 508-09 (1991).

93. 391 U.S. 367, 377 (1968) (upholding a conviction for burning a draft card).

94. *Id.* Assuming, *arguendo*, that violence is expressive conduct, *O'Brien* provides a good argument for upholding penalty enhancement statutes as constitutional because they facially meet the requirements of the test: (a) the conduct (violent crime) is properly regulable; (b) substantial state interests unrelated to suppression of free expression are advanced by the penalty enhancement statute ((i) preventing detrimental effects on society and the individual; (ii) preventing retaliatory crimes); (c) the state's interest (to address the perceived harms) is unrelated to the suppression of free speech; and (d) the limitation of free speech (the possibility of chilled speech) is no greater than necessary to serve the government's interests. For a more thorough analysis of *O'Brien* and penalty enhancement statutes, see Grannis, *supra* note 14, at 216-30; *see also* People v. Grupe, 532 N.Y.S.2d 815, 819-20 (N.Y. Crim. Ct. 1988) (determining that New York's ethnic intimidation statute would meet the *O'Brien* requirements).

95. Gooding v. Wilson, 405 U.S. 518, 520-21 (1972) (invalidating Georgia law prohibiting the use of "opprobrious" words or abusive language).

96. NAACP v. Button, 371 U.S. 415 (1963). Closely related to the overbreadth doctrine is the idea that free speech rights may be suppressed by laws that sweep too broadly in scope and, in effect, prohibit protected communication. *Id.* at 432-33.

this doctrine has been somewhat limited by the requirement that the overbreadth be substantial, particularly where conduct as well as speech is affected.[97]

Application of the overbreadth doctrine is clearly illustrated by the holding in *Lewis v. City of New Orleans*.[98] The Court in *Lewis* invalidated a city ordinance which prohibited cursing, reviling, or using obscene or opprobrious language toward an on-duty police officer.[99] The Court held that the proscription of opprobrious language was not limited to words which could be categorized within the definition of fighting words, and, therefore, the law effectively penalized all offensive speech including speech which may have been protected by the First Amendment.[100]

Underlying the overbreadth doctrine is the concern that chilled speech will result from laws that prohibit both protected and unprotected speech.[101] The Court prohibits such laws because of the belief that this chilling effect will cause people to forego their free speech rights and censor themselves for fear of future prosecution under the regulation.[102]

B. Use of Speech to Prove Biased Motive and Punishment of Acts Motivated by Bias

Clearly, the First Amendment does not guarantee absolute protection of speech;[103] moreover, some speech, subject to the

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97. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
98. 415 U.S. 130 (1974).
99. *Id.* at 132.
100. *Id.* at 134.
101. Gooding v. Wilson, 405 U.S. 518, 521 (1972).
102. *Id.* (quoting Coates v. City of Cincinnati, 402 U.S. 611, 619-20 (1971)). There is much debate over whether or not bias crime laws impermissibly chill speech. Gellman theorizes that because penalty enhancement laws punish thought, the words uttered by a defendant must be used to prove motive, and that this will result in self-censorship. Gellman, *supra* note 14, at 359-61. Gellman also states that awareness of the fact that any books read, speeches attended, views remarked, or prior associations could be used against you to prove biased motive would lead to self-censorship of expression of ideas whenever there is the fear that your idea is contrary to that of the majority. Gellman, *supra* note 14, at 359-61.

Another scholar reasons that chilled speech is "entirely unrealistic" because penalty enhancement laws do not target a person who expresses biased beliefs, but rather punish violent acts. Chang, *supra* note 14, at 468-69. "Experience suggests that criminalizing theft does not chill statements coveting material possessions. . . . [Nor does] criminalizing tax fraud . . . deter statements criticizing increased taxes." Chang, *supra* note 14, at 468-69 (footnote omitted).

103. *See supra* notes 63-72 and accompanying text.

applicable rules of evidence,[104] may be used against the speaker as evidence in civil and criminal litigation.[105] For example, prior inconsistent statements and admissions are regularly admitted against the speaker as proof in the case against him.[106] Acknowledging this, the Court routinely allows evidentiary use of a defendant's speech as proof of the offense charged in criminal cases.[107] In a civil context, the Court in *Price Waterhouse v. Hopkins*[108] also allowed evidentiary use of speech when examining a Title VII[109] discrimination claim.[110] When examining the application of evidentiary use of speech to penalty enhancement laws, it is important to recognize that while biased speech alone may not be punished, a defendant's speech may be used as evidence to prove that his biased motive controlled the selection of his victim.[111]

1. *Punishment of Motive in Criminal Law*

Criminal law routinely classifies crimes and punishment in accordance with the motives or thoughts a defendant had when

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104. The Federal Rules of Evidence, on which many states base their evidentiary rules, directly address the chilled speech situation, particularly FED. R. EVID. 403. Evidence of a defendant's views not directly related to the motivation for the criminal act will have little probative value and will likely be prejudicial if the views are contrary to popular sentiment. Thus, "a particularly stringent application" of evidentiary rules will be required because the chilling of expression will be intensified if the scope of admissible evidence is widened. Grannis, *supra* note 14, at 230.

105. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Street v. New York, 394 U.S. 576 (1969); Haupt v. United States, 330 U.S. 631 (1947).

106. FED. R. EVID. 801(d)(1)-(2).

107. *Street*, 394 U.S. at 594 (holding that use of defendant's speech to prove an element of an offense would be sufficient to sustain a conviction); *Haupt*, 330 U.S. at 642 (allowing use of defendant's speech to prove treason).

108. 490 U.S. 228 (1989).

109. Title VII prohibits an employer from discriminating against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

110. *Price Waterhouse*, 490 U.S. at 251-52 (holding that the employer's "stereotyped remarks can certainly be *evidence* that gender played a part" in the alleged discrimination).

111. *See* State v. Mitchell, 485 N.W.2d 807, 818-19 (Wis. 1992) (Abrahamson, J., dissenting), *rev'd sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). "[T]he state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. . . . The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime." *Id.* However, some scholars believe that use of speech in such a manner will have a chilling effect on free expression. *See, e.g.*, Gellman, *supra* note 14, at 360-61.

committing the crime.[112] Thus, criminal liability is customarily linked with a defendant's thoughts, and this has never been viewed as implicating, much less violating, a defendant's First Amendment freedoms.[113] In addition, evidence of a defendant's motive is often considered during the sentencing phase of a trial.[114] The Court has recognized that sentencing judges have traditionally exercised wide discretion in the sentencing process[115] and may properly consider the defendant's motive when determining the appropriate sentence to impose.[116] Furthermore, the Court has acknowledged that the sentence imposed for a particular crime should reflect the nature and seriousness of the conduct involved.[117]

Recently, the Supreme Court examined the role of motive as an aggravating circumstance in death penalty sentencing. In *Dawson v. Delaware*,[118] the Court held that a defendant's abstract beliefs are not relevant during sentencing, but acknowledged that the "Constitution does not erect a per se barrier to the admission of

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112. Generally, crimes are treated differently on the basis of the defendant's culpability; for example, murder can be intentional, reckless, negligent, or in self-defense, and the offense charged accordingly corresponds to the level of culpability. *See, e.g.*, MODEL PENAL CODE §§ 3.04(b), 210.1-210.4 (1962).

113. *See In re* Joshua H., 17 Cal. Rptr. 2d 291, 302 (Cal. Ct. App. 1993); Chang, *supra* note 14, at 466.

114. *See* Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992); Barclay v. Florida, 463 U.S. 939, 942-43 (1983).

115. Williams v. New York, 337 U.S. 241 (1949).

> [B]efore and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist in determining the kind and extent of punishment to be imposed. . . .

Id. at 246; *see also* Payne v. Tennessee, 111 S. Ct. 2597, 2606 (1991) (recognizing that a wide range of relevant material has always been available for the consideration of sentencing judges); United States v. Tucker, 404 U.S. 443, 446 (1972) (acknowledging that judges are allowed to conduct a broad inquiry, largely unlimited as to the type of information to be considered or the origin from which it comes).

116. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.6(b) (2d ed. 1986). Although motive is not relevant to substantive criminal law, a defendant's motives are very important at sentencing; if he was acting with bad motives he is more likely to get a higher sentence than if he was acting with good motives. *Id.*

117. *See* Tison v. Arizona, 481 U.S. 137, 156 (1987) (noting that historically in criminal law there exists the idea that the more purposeful the criminal act, the more serious the crime and, therefore, the greater justification for serious punishment); *Payne*, 111 S. Ct. at 2605 (assessing the harm caused by the crime is an important consideration in criminal law for establishing the elements of the offense and in fixing appropriate penalties); U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (Nov. 1993). The introductory comment to chapter five of the federal sentencing guidelines states that sentencing judges should consider the character and seriousness of the crime when determining the appropriate sentence.

118. 112 S. Ct. 1093, 1098 (1992).

evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[119] This view was previously espoused in *Barclay v. Florida*,[120] where the Court held that a defendant's racial animus is properly considered during sentencing when it is relevant to the offense committed.[121]

Therefore, although irrelevant and abstract beliefs may not be considered, evidence of a defendant's motive is admissible during sentencing as long as it is sufficiently related to the crime charged.[122] Penalty enhancement laws similarly involve the use of relevant evidence of a defendant's biased motive.[123] The pertinent evidence is used to prove that the selection of the defendant's victim was motivated by bias, and, therefore, the underlying crime is subject to penalty enhancement.[124]

2. *Punishment of Bias Motivated Acts in Civil Anti-discrimination Laws*

Anti-discrimination laws prohibit bias-motivated conduct; that is, actions performed because of a person's race, religion, gender, disability, or other protected status. For example, an employer is usually free to hire and fire whomever he pleases for whatever reasons, but under Title VII, an employer is prohibited from firing, refusing to hire, or otherwise discriminating against another on the basis of race, color, religion, sex, or national origin.[125] Employers are likewise prohibited from discriminating against an individual because of age or disability.[126] Although these acts could arguably be considered expressive conduct, bias-motivated acts of discrimination

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119. *Id.* at 1097 (holding that the sentencing judge improperly considered the defendant's membership in the Aryan Brotherhood because it was not related to the defendant's murder of a white victim).

120. 463 U.S. 939 (1983).

121. *Id.* at 949 (holding that the sentencing judge properly considered the defendant's membership in the Black Liberation Army in finding that "racial hatred" motivated the defendant's murder of a white victim).

122. *Id.*

123. *See* State v. Mitchell, 485 N.W.2d 807, 818-19 (Wis. 1992) (Abrahamson, J., dissenting), *rev'd sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

124. *Id.*

125. 42 U.S.C. § 2000e-2(a)(1) (1988).

126. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

receive no constitutional protection.[127] Consequently, the Court has upheld the constitutionality of anti-discrimination laws, such as Title VII, against First Amendment attack.[128]

The relationship between civil anti-discrimination laws and anti-bias crime legislation is a subject which had received little attention by the Supreme Court prior to *Wisconsin v. Mitchell*.[129] The state courts that addressed this issue before the *Mitchell* decision were in conflict.[130] Courts that upheld penalty enhancement laws found that civil anti-discrimination legislation was indistinguishable.[131] These courts concluded that both kinds of laws punish discriminatory actions taken because of the victim's status, as opposed to punishing protected speech.[132] Additionally, these courts held that motive was relevant to determining whether the victim was intentionally selected because of a particular status.[133] Conversely, courts that invalidated penalty enhancement laws found that the role of motive in anti-

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127. *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination . . . cause unique evils that [the] government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit."); Hishon v. King & Spaulding, 467 U.S. 69, 78 (1984) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)) ("Invidious private discrimination . . . has never been accorded affirmative constitutional protections."); Runyon v. McCrary, 427 U.S. 160, 176 (1976).

128. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546-47 (1992) (explaining that when regulations are not aimed at conduct on the basis of its expressive content, conduct is not protected from regulation simply because it expresses a discriminatory philosophy or idea).

129. 113 S. Ct. 2194 (1993). The subject was briefly addressed in *R.A.V.*, where the majority recognized that anti-discrimination laws were examples of permissible content-neutral regulation. *R.A.V.*, 112 S. Ct. at 2546-47. However, Justice White, in his concurring opinion, noted that the reasoning of the majority would draw into question the validity of anti-discrimination laws like Title VII. *Id.* at 2557-58 (White, J., concurring).

130. *See In re* Joshua H., 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993) (upholding California penalty enhancement law); People v. Miccio, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992) (upholding New York penalty enhancement law); Dobbins v. State, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992) (upholding Florida penalty enhancement law). *But see* State v. Wyant, 597 N.E.2d 450 (Ohio 1992) (invalidating Ohio ethnic intimidation law that provided for penalty enhancement), *vacated and remanded*, 113 S. Ct. 2954 (1993); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992) (invalidating Wisconsin penalty enhancement law), *rev'd sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

131. *See Joshua*, 17 Cal. Rptr. 2d at 300; *Miccio*, 589 N.Y.S.2d at 765; *Dobbins*, 605 So. 2d at 925. Although the Wisconsin Supreme Court struck down its penalty enhancement law, Justice Bablitch in his dissent stated that both types of laws involve discrimination, and both involve a victim and action taken because of the victim's status. *Mitchell*, 485 N.W.2d at 820 (Bablitch, J., dissenting).

132. *See Joshua*, 17 Cal. Rptr. 2d at 300; *Dobbins*, 605 So. 2d at 924.

133. *See Joshua*, 17 Cal. Rptr. 2d at 302; *Dobbins*, 605 So. 2d at 924.

discrimination laws and penalty enhancement statutes was dissimilar.[134] These courts reasoned that penalty enhancement laws were unconstitutional because they punish the protected, although biased, thought or motive behind the criminal act, whereas civil anti-discrimination laws punish the objective act of discrimination.[135]

IV. REASONING OF THE COURT IN *WISCONSIN V. MITCHELL*

In upholding the Wisconsin penalty enhancement provision,[136] the Supreme Court stated that conduct cannot be labeled speech merely because a person intends to express an idea.[137] The Court further noted that the First Amendment does not protect physical assault as a form of expressive conduct.[138] The Court also recognized

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134. *See Wyant*, 597 N.E.2d at 456; *Mitchell*, 485 N.W.2d at 816-17.

135. *See Wyant*, 597 N.E.2d at 456 (stating that anti-discrimination laws punish the discriminatory act, not the bigoted thoughts of the actor); *Mitchell*, 485 N.W.2d at 816-17 (stating that anti-discrimination laws prohibit discriminatory acts, whereas bias crime laws punish the subjective mental process of selection).

There has been much written on this subject in response to these divergent state holdings. In support of the view that motive is consistently employed in both types of laws, one commentator argues that the discriminatory thought motivating the act is the very reason why civil discriminatory acts and criminal discriminatory conduct are illegal. Note, *Hate Is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314, 1324 (1993). In response to the position that bias crime laws punish protected thought and anti-discrimination laws punish acts, another commentator contends that the purpose underlying the illegal act of intentionally discriminating against someone rather than an objective act of discrimination is the essence of illegal discrimination. Chang, *supra* note 14, at 455. Chang also points out that penalty enhancement statutes punish the decision to act, the culmination of thought and action, not merely a defendant's mental process. Chang, *supra* note 14, at 455.

136. Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993). The pertinent part of the Wisconsin statute at the time of Mitchell's conviction provided that the penalties for an underlying crime were increased if a person:

> Intentionally selects the person against whom the crime is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

Id. at 2197 n.1 (quoting WIS. STAT. § 939.645 (1989-90)). Preliminarily, the Court found that the Wisconsin Supreme Court's "assessment" of the penalty enhancement provision was not binding because it only characterized the practical effect of the law. Thus, the Court could form its own judgment as to its operative effect. *Id.* at 2198-99.

137. *Id.* at 2199 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)); *see also* Cox v. Louisiana, 379 U.S. 559, 563 (1965) (stating that certain forms of conduct mixed with speech may be regulated or prohibited), *reh'g denied*, 380 U.S. 926 (1965).

138. 113 S. Ct. at 2199 (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

that the sentencing process has historically been allowed wide latitude to consider a broad range of factors.[139] Additionally, the Court stated that motive has always been an important factor among the many considered when sentencing judges are determining the appropriate sentence.[140]

The Court acknowledged that a defendant's abstract beliefs which are in no way related to the offense may not be considered at sentencing.[141] However, the Court stated that there is no per se barrier to considering beliefs and associations which would otherwise be protected by the First Amendment.[142] The Court dismissed Mitchell's argument that *Barclay*[143] and *Dawson*[144] were inapposite[145] and stated that the decision of whether to impose the death sentence was the most severe type of penalty enhancement.[146]

The Court rejected Mitchell's principal argument that considering discriminatory motive is unconstitutional because it punishes protected thought.[147] When analogizing the role of motive in penalty enhancement provisions to the role of motive in anti-discrimination laws,[148] the Court recognized that both types of laws prohibit discrimination against persons because of their protected status.[149] The Court also cited Title VII and other civil rights statutes[150] as examples of "permissible content-neutral regulation of conduct."[151]

Next, the Court distinguished *R.A.V.* and concluded that it was not controlling precedent.[152] The Court stated that *R.A.V.* involved an unconstitutionally content-based regulation of fighting words which

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139. *Id.* (citing Payne v. Tennessee, 111 S. Ct. 2597, 2605 (1991); United States v. Tucker, 404 U.S. 443, 446 (1972); Williams v. New York, 337 U.S. 241, 246 (1949)).

140. *Id.*

141. *Id.* at 2200 (citing Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992)).

142. *Id.* (quoting *Dawson*, 112 S. Ct. at 1094).

143. Barclay v. Florida, 463 U.S. 939 (1983), *reh'g denied*, 464 U.S. 874 (1983).

144. Dawson v. Delaware, 112 S. Ct. 1093 (1992).

145. 113 S. Ct. at 2200. Mitchell argued that the reasoning of *Barclay* and *Dawson* was inapplicable because they were capital sentencing cases, not penalty enhancement cases. *Id.*

146. *Id.*

147. *Id.* at 2200-01.

148. *Id.* at 2200 ("[M]otive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.").

149. *Id.*

150. *Id.* (citing 42 U.S.C. § 2000e-2(a)(1) (1988); 18 U.S.C. § 242 (1988); 18 U.S.C. §§ 1981-1982 (1988)).

151. *Id.*

152. *Id.* ("Nothing in . . . *R.A.V.* compels a different result here.").

was directly aimed at expression,[153] but the Wisconsin penalty enhancement provision targeted unprotected conduct.[154] The Court also acknowledged that some crimes traditionally receive greater penalties because of their detrimental effect on society.[155] The Court recognized that the Wisconsin statute enhances punishment for bias-motivated crimes because the Wisconsin legislature believes such crimes to inflict great individual and societal harm.[156]

Finally, the Court dismissed Mitchell's overbreadth argument, stating that the alleged chilling effect was too speculative to support his claim.[157] The Court further noted that the First Amendment does not bar evidentiary use of a defendant's speech to prove motive or intent.[158] Consequently, the Court reversed and remanded the Wisconsin Supreme Court's decision, upholding the Wisconsin penalty enhancement law against Mitchell's First Amendment challenges.[159]

V. SIGNIFICANCE

The Supreme Court's decision in *Mitchell* makes it clear that violence will not be classified as expressive conduct and, therefore, will not receive First Amendment protection.[160] Although the Wisconsin penalty enhancement provision was clearly aimed at conduct, including violent and non-violent criminal acts, the Court did not address the constitutionality of a situation involving the penalty

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153. *Id.* at 2200-01.

154. *Id.*

155. *Id.* " '[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.' " *Id.* at 2201 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *16).

156. *Id.* at 2201. The Court also recognized that the determination of the level of punishment for criminal offenses lies within the discretion of the legislature. *Id.* at 2000 (citing Rummel v. Estelle, 445 U.S. 263, 274 (1980); Gore v. United States, 357 U.S. 386, 393 (1958)).

157. *Id.* at 2201. The Court concluded that:

> [t]he sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional 'overbreadth' cases. . . . [W]e are left . . . with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence . . . will be introduced against him at trial if he commits a . . . serious offense against person or property.

Id.

158. *Id.* at 2201-02 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989)) (quoting Haupt v. United States, 330 U.S. 631, 642 (1947)).

159. *Id.* at 2202.

160. Even though an *O'Brien* analysis would likely have resulted in upholding the penalty enhancement provision, *see supra* note 94 and accompanying text, the Court's failure to apply *O'Brien* strengthens its holding that violence is not expressive conduct.

enhancement of a non-violent crime. For example, it is unclear whether the *Mitchell* holding includes within its scope the vandalism of a black person's home by a white person who spray paints racial epithets on the walls of the house. However, under *Mitchell*, it seems unlikely that the Court will allow any criminal act to be elevated to the level of constitutionally protected expressive conduct.[161]

Besides the legal significance of this holding, there are two practical concerns that must be addressed. First, the probability of chilled speech resulting from such laws appears more than hypothetical. While the Court called it too speculative, self-censorship of one's beliefs for fear that they may be used to enhance a sentence if convicted of a crime seems to be a real danger. Although penalty enhancement laws facially target conduct, there is no doubt that they also indirectly affect speech. Second, there is the concern that penalty enhancement laws may be disproportionately enforced against the very groups they were originally designed to protect—minorities. Specifically, there have been reports that the current rise in bias crime rates is due to racially motivated black offenders.[162]

VI. CONCLUSION

Many states have recognized that bias motivated crimes cause specific harms to society. In an effort to address this problem, states have enacted various forms of anti-bias crime legislation.[163] In *R.A.V.*, the Supreme Court invalidated Minnesota's bias crime law for violating the First Amendment.[164] This ruling appeared to threaten the validity of many state laws aimed at punishing bias motivated acts. In *Mitchell*, the Court resolved the First Amendment issues concerning penalty enhancement for bias crimes. The Court clarified

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161. Unrelated to penalty enhancement but analogous to this situation is the newly passed federal law which prohibits the use of force, or threat of force, to intimidate or injure any person who seeks access to abortion related facilities. (*See* Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994)). Clearly, individuals have every right to protest abortion because they believe it is morally wrong. However, it would be ludicrous to allow them to claim that their conduct is protected expression when they commit a criminal act against an abortion clinic or its workers in furtherance of their beliefs.

162. *Hate Crime by Blacks Rising, Group Says*, WASH. POST, Dec. 12, 1993, at A14. Klanwatch Project reports that violence by blacks against whites, Asians, and Hispanics is escalating at an alarming rate and that blacks committed or were arrested for 41 percent of all racially motivated murders committed in the United States in 1993. *Id.*

163. *See supra* notes 10-13 and accompanying text.

164. R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992).

its holding in *R.A.V.* and explained that the law at issue in *R.A.V.* was struck down in violation of the First Amendment because it punished a defendant's protected speech.[165] The penalty enhancement provision in *Mitchell*, however, was upheld because it punished unprotected conduct, not protected speech.[166] Therefore, penalty enhancement laws that are similar to the Wisconsin statute are constitutional. As a result, states that have not yet enacted such a provision now have a constitutional model to follow when drafting their own bias crime laws.

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165. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200-01 (1993).
166. *Id.* at 2200.